PROTECTION OF WOMEN WORKERS AND THE COURTS: A LEGAL CASE HISTORY

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The issue of protective labor legislation for women has been at the center of many discussions of the proposed Equal Rights Amendment to the United States Constitution. Advocates of the amendment have argued that protective legislation that applies only to women is discriminatory, that the effect of such laws is too often to *restrict* women's employment opportunities rather than to "protect" them on the job. In contrast, opponents of the amendment often take the position that it will fly in the face of a century-long struggle for the protection of women workers by eliminating labor laws that are necessary and beneficial.[1]

The current debate over protective legislation has faltered because both sides have argued their positions in an historical vacuum. This essay is an attempt to contribute to a feminist perspective on the question by examining the largely unknown history of protective legislation in the United States in one important context, that of the decisions of the courts and particularly the Supreme Court, over the last one hundred years on the constitutionality of these laws. Protective labor legislation owes much of its shape–its very existence–to the decisions of state and federal courts upholding its validity.

To understand the decisions of the courts, we must place them against a background of two dominant and pervasive factors in American labor history: segregation in jobs and sex-based discrimination in the labor market. Language itself–there are workers, and then there are *women* workers–underscores this fact. Even today, as we read of women becoming the "first female" police officers, bus drivers, firefighters and construction workers in their locales, federal statistics bring us back to the economic reality that a woman earns, on average, fifty-seven cents for every dollar earned by a man. The Equal Pay Act and Title VII notwithstanding, the two dominant features of the labor market for women still remain

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segregation in low-paying, dead-end jobs in traditionally female occupations and discrimination against those who compete with men for traditionally male jobs.

It is in this context of sex segregation and discrimination that we must understand the concept of "protection" of women workers. It is my contention that the courts, in their decisions on protective legislation, have legitimated rather than challenged the second-class position of women in the American labor force. After a hundred years of rulings on various aspects of the employment of women, the courts in general and the United States Supreme Court in particular, have yet to recognize that women have a *right* to employment, a right to enter and pursue the occupation of their choice. The Supreme Court has viewed and continues to view women as "special," in a class by themselves, when it comes to employment. The courts generally see male workers as the norm and treat women as "aliens" in the labor force. They have conferred alien status upon women in the workforce by upholding laws that prohibit them from working in certain occupations; by validating so-called protective laws for women only that set different employment terms for women than for men (thereby making them unable to compete on the same terms); and most recently, by limiting women's fringe benefits to only those benefits required by men.

My analysis will focus on four historical periods. Concentrating on the implications of specific cases and decisions, I will try to lay the groundwork to answer what must be, for feminists, the ultimate question: Can women workers ever seek or accept protection as a class apart from working men without compromising their struggle for equality in the labor force? The first period opens with the decision of the Massachusetts Supreme Court in 1876 to uphold the first piece of protective legislation for women, and it closes with a ruling by the Supreme Court in 1923 that struck down a minimum wage law for women on the grounds of their supposed equality with men. Decisions in this early period focus on the constitutionality of protective laws for women only, and include the landmark *Muller* v. *Oregon* decision by the Supreme Court in 1908, which continues to have the most far-reaching effects on the treatment of working women by the courts. The second period, 1935 to 1948, encompasses the Great Depression and World War II. The exigencies of massive unemployment initially led to decisions which for the first time recognized the validity of protection for men and women alike; later, the contradictions of thousands of women taking so-called men's jobs during the war raised new questions of equality in the labor force for consideration by the courts. The third period, 1964 to 1971, was a time when unprecedented numbers of women entered the work force, aided by the first fair employment laws and an expanding war-time economy. For the first time, working women, rather than their employers, challenged protective legislation. The last section is devoted to the present, the last five years, during which the Supreme Court has ruled more often on cases charging sex discrimination against women workers than at any other time in its history.

"Protection" is still central to the debate in the recent cases; yet women workers are not seeking "special" protection for themselves as a class apart from men, but rather protection *equal* to that already afforded men. Furthermore, they are seeking protection against old and new forms of employment discrimination and occupational segregation by sex. Whether and to what extent the Supreme Court understands the nature of the new protection sought by working women is the focus of my conclusion.

Before turning to specific cases, a few remarks and qualifications are in order about the nature and efficacy of protective legislation. At the same time we analyze its effects, legally and socially, on limiting women's employment, we must still keep in mind the limited area in which it has operated. Protective labor legislation for women has never covered all women workers. These laws were originally enacted for the protection of women working in factories. In some states, they were later extended to saleswomen and to women in laundries, restaurants, and canneries. There have never been laws enacted to protect the vast number of female domestic workers or women in agriculture; rarely have professional women, such as nurses, teachers, and clerical workers, been included. At the peak of the protective labor legislation movement in 1930, only one-third of the eight and one-half million women working were covered by regulation of their working hours.

The scope of protective legislation has also been limited by difficulties in enforcing such laws. Each state has its own bundle of protective laws, and its own procedure for enforcement. Some of the laws are weakened at the outset by exceptions explicitly made for certain industries. For example, for years, many maximum hours laws excepted canneries during the months designated as "rush" season, which–in this seasonal industry–covered most of the months of employment. Other laws, although rigid in content, are not enforceable as, for example, those that require chairs for women workers. Finally, the penalties for violating many protective laws are so low that they do not act as a deterrent.[3]

THE FIRST COURT DECISIONS: 1876-1923

This period was marked by the struggle in the legislatures and courts for acceptance of the idea that workers, especially women and children, needed protection against their employers. By 1920 the legal, economic, and social bases for protective labor legislation for women, albeit *not* for men, were well established. A vocal minority of feminists, however, supporters of an Equal Rights Amendment, had begun to challenge the wisdom of protective labor legislation that covered women only. For this reason certain factions of the movement for social reform in industry in this period called for protective measures for all workers, regardless of sex. But the first protective law, adopted in 1874, was Massachusetts' maximum hours law for women and children in the textile industry. Why were men excluded from this legislation? To answer this, we must first look at the laissez-faire notion of freedom of contract. The theoretical right of *men* freely to enter into employment contracts—workers with capitalists, capitalists with workers—was considered the cornerstone of the American economy. Employees (males, that is) were, in theory, on an equal footing with their employers (also male), and had a right as citizens to be free of interference in their affairs, even if that interference took the form of "protection."

Women, however, still years away from the basic right to vote, were hardly able to be freely contracting citizens. Thus, like children, they were seen as fit subjects for regulation. In 1870, their legal position was still derived from the common law notion that a woman, on marrying, became a part of her husband. Until marriage, young women were considered wards of the state; marriage simply transferred their wardship to their husbands. State laws limiting the property rights of married women by conferring the right of property management to their husbands were one manifestation of this wardship. The idea that women, married or single, had the right to engage in any lawful occupation of their choosing also ran counter to the common law tradition. In 1872, the Supreme Court upheld the decision of an Illinois court to deny a woman the right to practice law; and twenty years later it upheld another state court decision that denied women the right to practice law in state courts.[3] This exclusion from certain occupations applied only to women; there were no instances in which men were forbidden from engaging in a particular occupation open to women. Of course, few men would have wanted the kind of work—and wages—available to women. In sum, then, if the law could exclude women entirely from some occupations, it could certainly "protect" them in others. And so, in 1876 the Massachusetts Supreme Court, in *Commonwealth* v. *Hamilton Mfg. Co.*,[4] upheld the first maximum hours law for women and children as a valid health measure.

There were, indeed, points at which the exclusion of men from protection was questioned. In *Holden* v. *Hardy*, in 1898,[5] the Supreme Court upheld a maximum hours law for miners, as it had for female textile workers in Massachusetts, on the grounds that it was a valid health measure in such a hazardous and unhealthy occupation. But in 1905 it returned to a strict view of protection for men as interfering with their freedom of contract. In *Lochner* v. *New York*,[6] the Court ruled against a maximum hours law for bakers on the grounds that it was not a valid health measure and thus unnecessarily interfered with the right of bakers to make contracts freely determining their working hours. In an opinion rife with laissez-faire ideology, the majority stated, "There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State interfering with their independence of judgment and of action. They are in no sense wards of the state."[7] In effect, the majority had engaged in a game of intellectual dishonesty, elevating liberty of contract as an absolute right guaranteed by the Constitution, although as the dissenting Justice Holmes correctly pointed out, reasonable restrictions on this "liberty," such as those recognized in *Holden* v. *Hardy*, had been consistently upheld by the Supreme Court. Holmes charged the majority with riding roughshod over the right of the citizens of New York to adopt laws which protected the health of their workers. Considerable evidence had indeed been submitted to the Supreme Court that bakers' work was grueling and unhealthy—no less so in its own way, in fact, than that of miners. Bakers suffered from inflammation of the lungs, running eyes, rheumatism, cramps and swollen legs, and had a shorter life span than that of other workers, according to studies placed before the Court. The majority, however, ignored the impressive studies and reports submitted and stated firmly that "to the common understanding, the trade of a baker has never been regarded as an unhealthy one."[8]

Throughout the majority opinion, it is clear that the five justices dreaded creeping social welfarism. All the scientific data were supplanted by their "common understanding" that bakers' work was not dangerous and that bakers were not in need of protection. While they could not overrule *Holden* v. *Hardy* (three of them were in the majority in that case), they intended to insure that miners were the only exception to the rule that men needed and wanted no legislative infringement on their "right to contract." It should be noted that the plaintiff in *Lochner*, as in *Holden* v. *Hardy*, was an *employer* who had been indicted for violating the maximum hours provision. Yet, in a twist of chicanery, the decision championed the right of the *employees* to freedom of contract.

All protective labor legislation was fair game for constitutional challenges after the *Lochner* decision. Two years later, New York's highest court invalidated a protective law that prohibited the employment of women at night because it was "discriminative against female citizens, in denying to them equal rights with men in the same pursuit."[9] In *Lochner*, advocates of protection had gone for the whole loaf–protection of all workers–and lost. Determined to salvage the protective labor legislation movement in the face of these adverse decisions, its leaders joined forces to win back one-half the loaf–protection for women–in *Muller* v. *Oregon* (1908).[10]

It should be noted that protective labor legislation for women was, at the time, much less than one-half the loaf, because women comprised less than 20 percent of the work force and were concentrated in their own "women's industries." Thus a ruling favorable to women stood little chance of affecting the majority of American workers–men. It was because of the inventiveness of the leaders of the protective labor legislation movement, most of whom were women, that even laissez-faire judges could be convinced that the regulation of female workers posed no real threat.

The *Lochner* Court had worried out loud that if (male) bakers could be regulated in their hours of work, so could (male) law clerks, (male) bank clerks, and other men employed by the professions. But because women were neither law clerks nor bank clerks, let alone lawyers or bankers, the creeping welfare state problem did not present itself with protective measures for them.

Still, there remained the problem of making legal sense of invalidating protection for men while retaining it for women. A very capable group of reformers, led by Josephine Goldmark of the National Consumer's League and Louis Brandeis, an attorney, showed the Supreme Court how to reconcile *Lochner* with a decision upholding the constitutionality of a maximum hours law for women in *Muller*. The "Brandeis Brief" argued that women were entitled to special protection on their jobs because, as mothers of the future generation, their health was a matter of public concern. Furthermore, women *required* such protection because "scientific studies" showed that women were not physically constituted to withstand long hours of industrial labor, whatever the industry. These arguments, supported by hundreds of pages of "scientific evidence" assembled by Josephine Goldmark, won the day for protection for women only in *Muller.*[10]

Acknowledging the impact of the Brandeis brief on its ruling, the unanimous Court concurred with the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." The Court's further remarks on the "nature" of woman are worth quoting at length:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

The Court went on to observations about the innate dependence of the female sex:

> Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.[11]

Muller's reasoning, so tailored to the Court's notions about the social role of women, certainly did not advance the cause for men. The Court pointedly did not overrule its decision in *Lochner.* The *Muller* decision did, however, seem to guarantee certain success in the courts for all future protective labor laws for women—unless the very nature of women changed, or the form of the protection posed a threat to the reigning law of laissez-fairism. Yet, in a rather quick turnabout to this logic, nine years later the Supreme Court upheld a maximum hours law for men, in *Bunting* v. *Oregon*,[12] and fifteen years later it struck down a minimum wage law for women only, in *Adkins* v. *Children's Hospital of the District of Columbia.*[13]

The same coalition that prepared *Muller* for the Supreme Court argued the constitutionality of the maximum hours law for men in *Bunting* and won the case. Their arguments are especially interesting in that they were analogous to those applied to women in the so-called Brandeis Brief in *Muller*. Josephine Goldmark and Felix Frankfurter, who replaced Brandeis as attorney, used the same scientific studies and reports from European countries submitted to the *Muller* court to prove that men's health was destroyed by long working hours in the same way that the health of women workers was irreparably impaired. It should be noted, however, that while state courts immediately followed the *Muller* decision, *Bunting* was ignored, and stood alone for years as the only case recognizing that the state could regulate men's hours in industries that were not extrahazardous (as was mining in *Holden* v. *Hardy*).[14]

In *Adkins* v. *Children's Hospital of the District of Columbia* (1923), the strategy that had worked so well in *Muller* and *Bunting* of gaining Court approval of "special protection" for women and then extending this protection to men was a miserable failure. The decision in *Adkins* defied the logic of *Muller* by invalidating a minimum wage law for women. The *Adkins* legacy was serious: not until 1941, nearly twenty years later, was the Supreme Court able to overcome it and uphold as constitutional a minimum wage provision for workers.

Reviewing its past decisions on protective labor laws—*Holden* v. *Hardy*, *Lochner*, *Muller*, and *Bunting*—the *Adkins* majority concluded that the *Lochner* dogma of liberty of contract should govern its opinion. The *Adkins* majority did not overrule *Muller*, but claimed that *Muller* was no longer controlling because women had achieved equality with men with the passage of the Nineteenth Amendment and no longer needed special protection in employment. The Court conceded that there were still physical differences between the sexes which could justify special maximum hours laws for women; but these could not be used to justify the new scourge of laissez-faire economics, the minimum wage law.

At times the Court opinion in *Adkins* ironically reads like a feminist tract as it attacks *Muller*'s paternalism:

> The decision [in *Muller*] proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. . . . In view of the great—not to say revolutionary—changes which

have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.[15]

Because of these "revolutionary" changes, the *Adkins* Court declared that women's freedom of contract could not be restrained:

To do so would be to ignore all the implications to be drawn from the present-day trend of legislation as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.[16]

The *Adkins* Court thus recognized that so-called protective measures might actually serve as restraints on women workers when applied only to them and not to their male counterparts. But despite the heady egalitarian language of the Court, its main concern was not guaranteeing the individual plaintiff, who earned thirty-five dollars a month as an elevator operator, the right to compete equally on the job with men; rather, it was to quash the latest attempt at social welfare legislation.

One final note on *Adkins*: there is a distinct quality of what I call "equal-rights-with-a-vengeance" in the Court's majority opinion. On the one hand, the majority agreed with *Muller*'s opinion that women's physical differences still make them physically unequal with men; on the other, the Court found that the Nineteenth Amendment, like magic, gave women instant equality with men in all fields of endeavor. The Court told women that, with the help of the Nineteenth Amendment, they were free to run on the same track with men as equals, as if they were at the same starting point. This insistence on the equality of women provoked a no less adamant insistence by two justices in their dissents that women were not (and never would be) equal because of their physical differences. As one stated succinctly, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."[17]

Neither *Muller* nor *Adkins* addressed the issue crucial to women: whether differential treatment of women and men workers was an invidious and unconstitutional form of discrimination, like race discrimination, which violated the Equal Protection Clause of the Fourteenth Amendment. And so women were forced to choose between decisions like *Muller* that upheld much-needed protective measures at the cost of separate and unequal treatment, or decisions like *Adkins* that espoused a theoretical equality between the sexes for the limited purpose of invalidating necessary and beneficial single-sex protective laws as a violation of the even more abstract "freedom of contract." In the 1920s, most organizations speaking for women workers–trade union women and reformers–went for the protection.

The cost of this strategy can be seen in *Radice* v. *New York* just one year later.[18] The Court upheld a New York criminal statute prohibiting the employment of women in restaurants between 10 P.M. and 6 A.M., thus excluding many women workers from night work. The night work prohibition was deemed a valid protective measure because the state legislature had a mass of information showing that night work was harmful to the health of women. The Court deferred to the legislature's judgment that the harmful effects of night work bore more heavily against women than men because women were more "delicate." *Radice* is a clear-cut instance of sex discrimination in the guise of protection.

The element which unites all the cases in this period is the treatment of women workers as a class in need of special protection. It was not unreasonable for protective labor law advocates to use this tack. It could work to the benefit of women *and* men, as the *Bunting* decision proved. It was also not entirely unreasonable, given the sex segregation of the labor force, to view women workers in those years as a class apart from men. What *was* unreasonable was the intellectual basis put forth to justify treatment of women workers as a separate class. Women were said to be physically weaker, burdened by the responsibilities of motherhood and therefore dependent on men for their protection. Anatomy, for women, spelled economic dependency–not just for some women, but for all women. This, despite the fact that the vast majority of working women were the sole support of themselves or their children or families.

In the period when protective legislation was first propounded, even the staunchest advocates of laws for the protection of women only recognized that men also needed protection and that, in the end, the goal was regulation of *industry* for the protection of *all* workers. As Felix Frankfurter put it:

> Once we cease to look upon the regulation of women in industry as exceptional, as the law's graciousness to a disabled class, and shift the emphasis from the fact that they are *women* to the fact that it is *industry* and the relation of industry to the community which is regulated, the whole problem is seen from a totally different aspect.[19]

Frankfurther also stated that "science has demonstrated that there is no sharp difference in kind as to the effect of labor on men and women."[20] Yet, he still insisted there was a difference in *degree*, that both men and women need protection, but for apparently different reasons. But whether a jurist recognized a difference in *kind* or in *degree* between women's and men's needs for job protection, the result would be the same. Women were lumped right back into that "class by themselves" where by "nature," with a little help from the law in *Muller*, they belonged.

PROTECTION FOR EVERYONE–EXIGENCIES OF DEPRESSION AND WAR: 1935-1948

In the 1930s, the Great Depression forced millions of women and men out of work. In the 1940s, the demands of wartime industry and the exodus of men to the military allowed thousands of women to enter the industrial labor force. Until the Depression, most labor legislation had emanated from the states–all of the protective labor laws challenged in the *Muller* era were state or local statutes. The national scope of unemployment in the Depression, however, called for a national policy on employment and labor relations. The federal government did not preempt the field of labor law; but from 1932 onward, it was involved with the states in the passage of social welfare legislation for workers.

The major pieces of federal legislation in this period were the Social Security Act of 1935 and the Fair Labor Standards Act of 1938. The Fair Labor Standards Act incorporated the major types of state protective laws into a comprehensive labor law that applied to workers regardless of sex. It provided for minimum wages and maximum hours and increased compensation for overtime for those employees it covered (those engaged in the production of goods for interstate commerce).

The Social Security Act established an entirely new kind of protection for workers. Under this act the federal government set up a system for the *future* protection of workers and their families against job loss through infirmity, disability, and old age. Like the Fair Labor Standards Act, it covered all workers regardless of sex. Nonetheless, many of its provisions discriminated against women by not providing them with the same protection afforded to men. The provisions of the Fair Labor Standards Act, however, did not treat women workers differently than their male counterparts. In providing for maximum hours and minimum wage limitations for men as well as women, Congress had clearly accepted the position that all industry–not just particularly hazardous or unhealthful employments–needed to be regulated for the general welfare.

Congress succeeded in passing this law just one year after the Supreme Court had been asked to reconsider its ruling in *Adkins.* With the threat of a court-packing measure over its head, it reversed itself by upholding a state minimum wage law for women in *West Coast Hotel Co.* v. *Parrish.*[21] The minimum wage law at issue in *Parrish* had been in effect in Washington State since 1913. It had withstood two state court challenges to its constitutionality. Thus, despite the adverse *Adkins* decision, proponents of protective labor laws for workers had kept the battle for minimum wage provisions alive until the time was right to return to the Supreme Court. (It is a testament to the strength of laissez-fair-advocates that in 1937 in the midst of massive unemployment and impoverishment, the Supreme Court could barely muster a five to four majority to uphold the state of Washington's minimum wage law.)

The majority in *Parrish* based its holding in part on the "common knowledge" it had gained from the Depression of workers' needs for protection:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but places a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved.[22]

This would seem to imply that a minimum wage for men as well as women was valid. Unfortunately, the Court turned aside from this implication by reinvoking the spirit of *Muller.* But the decision against a minimum wage in *Adkins* had to be faced, and *Muller* was used to dispose of it:

> With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?[23]

Women were "ready victims," the lowest paid class of workers with the least bargaining power. Protecting them was a legitimate exercise of state power.

What about the fact that men were in need of the same protection, and that this law, in covering only women, was sex discriminatory? The Court dismissed this argument as "unavailing," adopting for a whole new generation of jurists the position that protective measures for women only were reasonable under the Due Process Clause of the Fourteenth Amendment. Along with this legal theory came the belief, supported by fact and fiction, that all women workers needed more and special protection than did all men workers: first, women workers as a class were more exploited; second, their health was a matter of *public* interest because of their function as mothers.

After *Parrish*, the pattern of the earlier *Muller* and *Bunting* cases was repeated. Once again the "weaker" class, women, in gaining constitutional acceptance of their need for special protection, prepared the way for general acceptance of not-special protection for men workers. Four years after *Parrish*, the Supreme Court upheld the minimum wage provisions of the Fair Labor Standards Act, which were applicable to men and women alike.[24] Thus the half-loaf/whole-loaf strategy worked well, winning approval of the newest and most potent protective measure–the minimum wage law–for all workers regardless of sex. Perhaps the language and reasoning were different, sometimes repugnant, when the Court ruled on a "women's case," but in the long run did not all workers benefit from the strategy?

The answer is no. And the best (or worst) support for this answer is the outrageous decision of the Supreme Court in *Goesaert v. Cleary*,[25] which upheld a Michigan "protective" labor law for women in the bartending business. The concept of "protection" in *Goesaert* is not one of improving work conditions for a class of workers, but rather of "protecting" one class of workers (men) from competition from another class (women). Writing for the Court, Justice Felix Frankfurter, champion of protective labor legislation, upheld a Michigan law that *prohibited* all women from working as bartenders (except the wives and daughters of male bar owners). The words of *Muller* and *Parrish* were perversely used against the women in *Goesaert*, who sought the Court's protection against a law whose sole purpose and effect was to keep them out of a high-paying, male-dominated profession. Michigan women had made some inroads into the profession during World War II; and after the war, Michigan men returned and wanted their bartending jobs back. Their male-dominated union and legislature paved the way with this "protective" measure for women.

Goesaert completely denied a woman's right to employment. No decision before or after *Goesaert* is so clear on the point that a state may absolutely bar women from any given profession. Justice Frankfurter interpreted the Fourteenth Amendment, as did his brothers before and after, to permit sex classifications as long as there was a rational basis—any rational basis—to support doing so. In *Goesaert*, he hypothesized a state interest in protecting the morals of women as the "rational" basis for sex classification.

The American labor force, from the start of the industrial age through the 1930s, was characterized by a high degree of sex segregation by occupation. Only during World I did women make some significant but short-lived breakthroughs into male-dominated industries. Until World War II, however, women by and large did not compete with men for jobs. World War II, which called millions of men away from their jobs for several years, gave women their first opportunity on a large scale to penetrate men's industries, such as the steel, automobile, and defense industries. Women also entered service occupations, like bartending, that had been dominated by men before the war. At the close of World War II, more women were in the labor force in more varied occupations than ever before. Although sex segregation still dominated the labor force, a significant number of men found themselves in occupations in which they had to compete with women for jobs.

As they looked about for ways to win back their jobs, men were helped not only by federal veterans' preference acts, but also by old and new state "protective" laws for women. Such laws for women only, particularly the old maximum hours laws, weight restriction laws, and more recent premium overtime provisions, were enforced (often for the first time), to *remove* women from competition with men. They were turned upside down and applied to keep women out of jobs, rather than to protect them on the job. For example, in many factories promotions came to be based on the amount of overtime a worker put in. If a state had a maximum hours law for women, all women covered by the law were precluded from doing the overtime necessary to win promotions. Employers could claim they were simply obeying the protective law, in "good faith," when they promoted only men. They also could claim to be operating in good faith when they hired only men on the grounds that they needed people who could work overtime. Thus, female "veterans" of World War II in many factories around the country worked for years after the war without promotion. Laws enacted for their protection were perversely used to keep them at the lowest level position in "men's industries." Where the old laws did not do the entire job, states passed new laws like Michigan's *Goesaert* provision.

PRESSURES FOR EQUAL OPPORTUNITY: 1964-1971

Through most of the Eisenhower years the nation was in an economic recession, but in the early 1960s the labor force began to grow again. The largest growth came in the number and proportion of full-time women workers. By 1968, 37 percent of all workers were women. These new workers were considerably older than the women who had worked in the 1920s. While the average age of women workers in 1920 was twenty-five years, the average in 1970 was forty-five years. Women who entered the labor force in the 1950s and 1960s also stayed longer. Two-thirds worked out of dire necessity, either as the sole breadwinner or to help support a family with an annual income below $7,000.[26]

Although their economic needs were the same as those of men, women workers were rarely able to earn as much. At one point in the 1960s, women's wages, on average, had climbed to 60 percent of men's wages, but since then the gap has widened again. Spurred by women's growing demands for wage parity and better job opportunities, Congress adopted two important pieces of "protective" legislation. The Equal Pay Act of 1963 provided that women and men should get equal pay for the same or similar jobs. Furthermore, in situations in which men earned more than their female coworkers, employers could not lower the men's salaries to meet the provisions of the new law; they had to raise women's wages to the level of men's.

The Equal Pay Act was limited in its usefulness to integrated situations in which women worked side by side with men. Title VII of the Civil Rights Act of 1964 was a much more comprehensive fair employment law. It prohibited discrimination in employment on the basis of sex, race, color, religion, and national origin. Title VII also called for affirmative efforts by employers to provide equal employment opportunities to groups like blacks and women who had suffered from discrimination in the past.

Title VII gave women a powerful legal tool to help dismantle the outdated network of state protective labor laws that too often were used against them to protect men's jobs. It explicitly prohibited employers from classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex." The strength and simplicity of its prohibition of both sex discrimination and sex segregation, however, were diluted by another provision of Title VII. The section, known as the bona fide occupational qualification (BFOQ) defense, reads: that it is not unlawful to hire on the basis of sex "in those certain instances where . . . sex, . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."[27] It is important to note that there is no bona fide occupational qualification defense against race discrimination in Title VII. Title VII's enforcement agency, the Equal Employment Opportunity Commission (EEOC), did make it clear that the BFOQ exception was to be narrowly construed. Today, in fact, many Title VII scholars think the BFOQ defense has been narrowed down into total disuse.[28] But in the early days of Title VII interpretation, the EEOC, under a great deal of pressure from unions and employers alike, stated in its guidelines that certain state protective labor legislation for women only would be valid as a BFOQ exception. In 1969, the EEOC took the position that "the Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider qualifications set by such state laws or regulations to be bona fide occupational qualifications."[29] This guideline appeared to be limited to laws that provided real, not sham, protection against "exploitation and hazard." But who was to determine which were real and which were sham, especially in light of the Supreme Court's ruling in *Goesaert*, upholding a sham protective law as though it were real?

Women workers themselves took on the task of challenging sham laws as violating Title VII. After some initial setbacks, they won a major part of the legal battle in two federal circuit court decisions, *Weeks* v. *Southern Bell Telephone and Telegraph Company* and *Rosenfeld* v. *Southern Pacific Company*.[30]

In *Weeks*, the plaintiff sought the job of "switchman" in the phone company and was denied it on the pretext that it was "strenuous." Southern Bell claimed that women were not able to perform the switchman job because it required weight lifting and strenuous physical exertion. Southern Bell could not contend that the state mandated that women *should not* do strenuous work because the one Georgia law prohibiting women workers from lifting over thirty pounds had just been superseded by an amendment that made this law sex-neutral. Consequently, the *Weeks* court held that Southern Bell had to prove that women actually *could not* do the job. The Court concluded that the telephone company failed to so prove:

They introduced no evidence concerning the lifting abilities of women. Rather, they would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can. While one might accept, *arguendo*, that men are stronger on the average than women, it is not clear that any conclusions about relative lifting ability would follow. . . . What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.[31]

Fully aware of women's growing presence in the labor force and their demands for men's jobs hitherto denied them, the *Weeks* court closed with a refreshing breath of reality: "Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing."[32] Thus, according to the *Weeks* court, Title VII would not tolerate the type of sex classification permitted by the Supreme Court in *Goesaert* in which it was used against individual women who were willing and able to do "men's work."

Two years later, the Ninth Circuit Court of Appeals tackled head-on the conflict between Title VII and protective labor laws for women in *Rosenfeld* v. *Southern Pacific Company*.[33] The plaintiff, Leah Rosenfeld, wanted to be an agent-telegrapher. Southern Pacific denied her the job on two grounds: first, that women were not physically or "biologically" suited for such work; second, that giving the plaintiff the job would violate California's maximum hours and weight restriction laws for women. In the interim between *Weeks* and *Rosenfeld*, the EEOC formulated a new guideline on protective labor laws:

The Commission believes that such state laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964. . . .[34]

The *Rosenfeld* court deferred to this interpretation of Title VII. It rejected Southern Pacific's claim that protective laws provided a bona fide occupational qualification defense to the exclusion of Leah Rosenfeld and other women. As to the argument that women as a class were not suited for the work, the *Rosenfeld* court said that individual women, like individual men, had to be given the opportunity to show that they were physically qualified for a job:

"This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work."[35] The *Rosenfeld* court clearly enunciated Title VII's mandate that women workers be treated and judged as individuals, not lumped into a class by themselves–a class defined by assumptions and stereotypes of the generic woman. It was not as clear nor as helpful in hastening the demise of sham protective labor laws for women. In a very important aspect of the case, the court recognized that Southern Pacific had used a weight restriction law to keep women out of desirable jobs, but concluded nonetheless that the company had relied in good faith on the law and therefore owed Rosenfeld no damages for its discrimination. The court stated tersely that, "an employer can hardly be faulted for following the explicit provisions of applicable state law."[36]

Consequently, to this day employers can continue to rely on protective labor laws, wherever they still exist, to exclude women from jobs. If caught, they are told to stop and the law is struck down; but the good faith reliance doctrine, as set forth in *Rosenfeld*, has consistently been used to deny women any damages for the employer's past discrimination.[37] Without an effective deterrent such as large back pay awards, women workers must continually bring lawsuits to challenge their particular employers and their states' particular "protective" laws.

The first Title VII case involving sex discrimination decided by the Supreme Court was *Phillips* v. *Martin-Marietta.*[38] It did not involve the conflict between Title VII and protective laws for women. Instead, the plaintiff in *Phillips* claimed that she had been denied a job because she had preschool age children, while men with preschool age children were hired for the same job. The Supreme Court dealt with the issue of whether this differential treatment constituted sex discrimination under Title VII. The lower court in the case had said that while sex may have been a factor in the employer's decision, it was not the only factor. The main reason for denying Phillips the job, the lower court had decided, was not that she was female, but that she had children for whom she had to care.[39] Title VII, the lower court stated, did not prohibit discrimination based on sex *plus* another factor, a legitimate factor. There was no pure male-female discrimination; rather, there was discrimination between certain women workers, those with preschool age children, and all other workers, male and female.

The Supreme Court did not agree with the lower court's analysis and gave women workers a tentative but important victory in *Phillips.* It referred the case back to the lower federal court for "facts" on whether the burdens of motherhood were greater than the burdens of fatherhood in terms of employee absenteeism. But it stated that the policy, at first glance, of hiring men with preschool age children and not hiring women similarly situated appeared to violate Title VII. For that reason the Court placed the burden on the employer to defend its policy either as a business necessity or as a legitimate BFOQ exception.

Protection was not a visible issue in *Phillips*. But the same general assumptions about women that sustained protective measures for women over the years were at play. The first protective laws were passed so that women workers would be strong enough to become mothers with healthy children; the plaintiff in *Phillips* was a mother of young children. Left unspoken was the further assumption that, with motherhood, a woman should leave the work force for her "rightful place" in the home. While many women did leave the labor force when they became mothers, or even earlier when they learned of their pregnancies, many others could not afford to leave their jobs for motherhood or any other reason. Ida Phillips was working as a waitress on the all-night shift when she applied for the much higher-paying daytime position with Martin-Marietta. The day job would have given her the chance to be with her children before school and in the evenings, and it would have given Phillips and her children much better protection in terms of job security, medical coverage, and pension benefits. Yet she was denied this employment opportunity in the name of motherhood and her responsibilities to her children.

THE FIGHT FOR EQUAL PROTECTION IN THE SEVENTIES

For the past five years working women have kept the Supreme Court very busy by challenging laws and policies that deny them the same employment rights as men and equal protection on the job with men. There are two major lines of cases, the pregnancy cases and the dependency cases, that have evolved in this short period.

In the pregnancy cases, women plaintiffs put forth arguments supporting their fundamental right to employment and, as part of that right, the right to equal benefits with their male coworkers. The first of these cases, *Cleveland Board of Education* v. *LaFleur*,[40] challenged the compulsory maternity leave policy of the Cleveland Board of Education which forced women teachers who became pregnant to leave their jobs at the end of their fifth month of pregnancy. *LaFleur* was the first case at the Supreme Court level to isolate one of many long-standing policies used to get women out of the work force once the "burdens of motherhood" approached.

As I have noted, pregnancy and motherhood were rationales as far back as *Muller* for giving women more protection than men. Such protection, like maximum hours laws, was designed to keep women healthy until they left their jobs for their *real* function in life, motherhood. Employers, legislators, and judges had assumed for years that working women, at the point of pregnancy, would voluntarily leave the labor force. When women did not conform to this assumption, employers such as the Cleveland Board of Education wrote policies to force them to leave. Compulsory maternity leaves were in fact terminations, but because of men's assumptions about pregnancy, they were called "personal leaves" rather than medical or sick leave; and women were generally not only terminated but, because they were no longer considered employees, were also denied medical and pregnancy disability benefits.

When *LaFleur* was argued before the Supreme Court, all states had a series of laws and policies that were adopted to force women out of the work force on the grounds of pregnancy and to keep them out—well beyond the period of convalescence following childbirth. These laws ranged from the *LaFleur*-type compulsory maternity leave to the denial of unemployment compensation to pregnant women workers to requirements that women with children, in order to collect unemployment insurance, show proof of their childcare arrangements. *LaFleur* was the first case before the Supreme Court to challenge this pervasive and systematic discrimination on the grounds of pregnancy as a denial of equal protection to women workers. Justice Stewart, writing the opinion for the Court, did not follow the lower court's lead and treat the case as an employment discrimination case. Nor did he agree with the lower court that women were denied equal protection with respect to their employment rights. Instead, he struck down the policy on forced maternity leave as an arbitrary and unreasonable interference with a woman's *personal right to privacy in matters of childbearing*:

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms.[41]

Justice Stewart totally ignored the equal protection issue raised by the plaintiff and adopted by the lower court. that the forced leave policy was sex discriminatory. Stewart's decision clearly demonstrates that the Court could not get beyond its assumption that pregnancy is a *personal* matter, not an employment concern as well. The Court made no acknowledgment of a woman's right to work, pregnant or otherwise. In fact, it found fault with the forced leave policy only on the grounds that it was so restrictive; it unduly penalized women for getting pregnant. Thus the door was still left open for *less* restrictive forced leave policies.

LaFleur also left the door open for other forms of discrimination against women in the name of pregnancy. Employers who terminated women on the grounds of pregnancy also excluded them from medical and disability coverage. The reasoning was clear: once a pregnant woman was forced to leave work, the employer had no more responsibility to her because the employer intended and expected that her leave be permanent. The reality, however, was different. Even though women were forced to leave at some point in pregnancy, they expected to return to work, if only to pay off the medical expenses of pregnancy and childbirth. The reality was that women needed to work as much as men, and for the same economic reasons. Women plaintiffs placed this reality before the Supreme Court in *Geduldig* v. *Aiello* and *General Electric Co.* v. *Gilbert.*[42] The policy challenged in *Aiello* and *Gilbert* was that of excluding disabilities related to pregnancy and childbirth from health and disability insurance plans.

In *Aiello*, women employees challenged such a plan as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court, evoking the spirit of *Goesaert*, held that a plan was rational that covered all disabilities known to man except disabilities related to childbirth (which, of course, are known to man, but only experienced by women). But the *Aiello* decision went one important step beyond *Goesaert*'s finding that sex discrimination was rational so long as the Court could find any basis for the gender-related classification. The *Aiello* court insisted there *was* no sex discrimination in pregnancy discrimination:

> [T]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .[43]

This reasoning was based on the "sex-plus" doctrine which the Supreme Court ostensibly rejected in *Phillips.* The logic of the lower federal court in *Phillips* was that it was nondiscriminatory to deny a woman a job because of her sex *plus* the fact that she had small children. Similarly, the Supreme Court in *Aiello* argued that it was nondiscriminatory to deny a woman job protection in the form of disability payments because of her sex *plus* the fact that she was pregnant. While it is true that not all women workers are pregnant, as the Court in *Aiello* (and later in *Gilbert*) so perceptively noted, it is also true that not all women workers have preschool age children. The Supreme Court, however, failed to see the conflict between its reasoning in *Aiello* and its decision in *Phillips*.

In *General Electric Co.* v. *Gilbert*, the Court reviewed a disability income insurance plan under Title VII. The decision in *Gilbert* is the best example of intellectual dishonesty masquerading as adherence to "established constitutional principles" since *Lochner* (*Goesaert* runs a close second). *Gilbert* cannot be analyzed in a logical way because it defies logic. The Supreme Court majority in *Gilbert*, for instance, claimed that because "discrimination" was nowhere defined in Title VII, the Court must look to the Fourteenth Amendment and cases decided thereunder for the definition of "sex discrimination." The Court could have looked to *Weeks* or to its own opinion in *Phillips*—in short, to the whole line of sex discrimination cases decided under Title VII, but it did not. It could have looked to the guidelines of the EEOC, Title VII's enforcement agency, for its definition of discrimination, but it did not. In sum, as a dissenting justice pointed out in his opinion, the majority created a conceptual framework that made inevitable its conclusion that the exclusion of pregnancy-related disabilities from comprehensive disability plans did not violate Title VII's prohibition against sex discrimination.

In these three cases, *LaFleur*, *Aiello* and *Gilbert*, women workers asked the Supreme Court to provide them with a measure of *real* protection on the job—protection against job loss, loss of income, and other economic hardship during a period of temporary disability after childbirth. Unlike their sisters in *Muller*, they were not asking for special protection or for more protection than men. They were, indeed, asking for protection that would have cost employers some money, but as men workers have learned, most real protection does cost money. While the Court in *LaFleur* was ready to allow women to continue working beyond the fifth month of pregnancy, it was not ready to shed the notion that pregnancy and childbirth are personal concerns for individual women rather than a legitimate employment concern which all employers of women must take into account. One gets the distinct impression that the Court saw a man in the background in every case, with an income and health insurance to cover his working wife's expenses during her childbearing leave. While that may have been the ideal of the Court, it is not the real situation (or the ideal one) for most women.

Women workers have fared much better to date in the dependency cases. These cases have had the common theme that women were presumed to be dependent on men for their support, while men were presumed *not* to be dependent on women for their support. Here again, the theme was as old as *Muller*; and it has had some basis in fact, given the pervasive discrimination against women in employment that results in the segregation of women into low-paying clerical and service jobs, and the large gap between women's and men's earnings. But the factual basis could also be used to conjure up time-worn fictions about women. In *Kahn* v. *Shevin*,[44] for example, the "poor old widow lady" was revived to sustain a magnanimous $500 tax exemption for widows (but not for widowers) in Florida on the grounds that the legislature *might have intended* that the exemption be one-way to eliminate the effects of past discrimination against women. Such reasoning would have been most welcome in *Aiello* and *Gilbert* in which the protection sought was real. But in *Kahn* v. *Shevin*, in which the protection was minimal, it was another variation on the *Goesaert* theme that sex classifications will be upheld, no matter how discriminatory, so long as a Court can find some basis in reason, no matter how hypothetical.

In contrast, the Court's decisions in *Frontiero* v. *Richardson*, *Weinberger* v. *Wiesenfeld*, and *Califano* v. *Goldfarb*[45] took account of actualities in working women's lives. In all three cases, the Court treated women as individuals entitled to the same protection as men; and furthermore, it recognized that their contributions to their family's support were as significant as the contributions of men. In *Frontiero*, a four-judge plurality held that sex should be treated as a suspect classification just like race under the Fourteenth Amendment. The Court struck down a military provision that required women, but not men, to prove that their spouses were actually dependent on them in order to get a dependency allowance added to their salary.

Both *Wiesenfeld* and *Goldfarb* involved provisions of the Social Security Act of 1935 that denied husbands of deceased women workers the same survivors' benefits granted to wives of deceased male workers. *Wiesenfeld*'s provision was an absolute denial, while *Goldfarb*'s required proof of actual dependency similar to that required by the military provision in *Frontiero*. Both were based on the "generally accepted presumption that a man is responsible for the support of his wife and children"[46] while a woman is not responsible for her husband. Justice Brennan dealt with these general presumptions about men and women with a directness that is encouraging:

> Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. . . . But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.[47]

The difference between the *Wiesenfeld* decision and *Aiello* can certainly be expressed in legal terms. The major difference in constitutional interpretation is that *Wiesenfeld* treated sex discrimination as race discrimination under the Fourteenth Amendment and *Aiello* did not. The Court that does not treat sex discrimination as invidious and that uses irrational arguments to deny its very existence is still operating with a *Muller* mentality about women workers. Thus, the Court in *Aiello* and *Gilbert* continued to treat women as fit *subjects* for different treatment and regulation by employers and state legislatures alike, without inquiry into the motives and effects of such differential treatment and regulation. In contrast, the Court in *Frontiero, Wiesenfeld,* and *Goldfarb* treated women as they would treat men, as individuals entitled to equal treatment in employment, as in every other field of endeavor. The two lines of cases cannot be reconciled. The *Aiello-Gilbert* Court still saw women as "the problem," while the *Wiesenfeld* Court finally viewed the issue as the regulation of employers for the protection and benefit of all workers equally.

CONCLUSION

Sixteen-hour days have given way to eight-hour days, but workers still need protection. The movement for protective labor legislation never encompassed some of the most exploited workers. Groups like farmworkers and household workers, mainly black and Hispanic, are still fighting for maximum hours, a minimum wage, and basic fringe benefits.

The most exploited workers have never been all male or all female, although they have usually been racial and ethnic minorities. Just as the law lets both rich and poor sleep under bridges at night, it lets both women and men be exploited by their employers. But just as more of the poor sleep under bridges than the rich, more women have been treated worse by their employers than have men. What is wrong, then, with adopting a protective law to cover *all* women on the basis that many women actually need the protection?

What is wrong, I contend, is that some women do *not* need the protection, and that many *men* who do need the protection are left out. Above all, as the historic practice of courts and employers shows, sex-defined protective laws too easily become a basis for exclusion.

Protection of workers along sex lines, while politically necessary in the past, is at this point harmful to both the movement for protection and the movement for equality for all workers. Neither women nor men can afford to be in a class by themselves when a real need exists for protection on a particular job. If, for example, lead poses a health hazard to women of childbearing age, protective measures should be aimed at eliminating the hazard, not at removing all women as a class from jobs involving lead. Furthermore, hazards to men of childbearing age should not be overlooked by employers who express zealous concern for their women employees' health. Perhaps the danger is to the reproductive system of both women and men and the employer will have to spend money to eliminate the danger, rather than to "over-protect" women out of their jobs and "under-protect" men on the job.

For women, class protection has been more often a curse than a blessing. In order to support class legislation protecting women, courts have consistently gone far beyond legal theories to rely on "widespread beliefs" (*Muller*) and "common knowledge" (*Parrish*) about the generic Woman. They have spun a web of myths about all women—all women are weaker than men, all women are dependent on men, all women will leave the labor force and become mothers. And this web has too often ensnared women workers and held them back from their goal of equality with men in the labor force. All women *are* entitled to equal employment opportunity and equal protection on the job, but the way to achieve this is not through class legislation that singles out women for some sort of "special" treatment. Rather, the way to achieve equality is to recognize that women are in the labor force to stay; that their needs are the needs of all workers; and that policies or laws—or disability insurance plans—that do not take this into account deny them their right to equal protection in employment. Women do not want to be "special"; they want to be equal.

NOTES

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[1] See the 1970 debate on the Equal Rights Amendment on the floor of the House of Representatives for a presentation of the controversy over protective labor legislation. 116 *Congressional Record* 137 (91st Congress, 2nd Session), pp. H-7947–H-7985 (August 10, 1970).

[2] For a detailed historical account of the weaknesses inherent in protective legislation, see Elizabeth Baker, *Protective Labor Legislation* (New York: Columbia University Press, 1925), pp. 278-350. See also, Barbara Babcock et al., *Sex Discrimination and the Law* (Boston: Little, Brown, 1975).

[3] Bradwell v. the State, 16 Wall. 130, 141 (1872); *Ex Parte* Lockwood, 156 U.S. 116 (1893).

[4] 120 Mass. 383 (1876).

[5] 169 U.S. 366 (1898).

[6] 198 U.S. 45 (1905).

[7] Ibid., p. 57.

[8] Ibid., p. 59.

[9] People v. Williams, 189 N.Y. 131 (1907).

[10] Muller v. Oregon, 208 U.S. 412 (1908).

[11] Ibid., pp. 420-22.

[12] 243 U.S. 426 (1917).

[13] 261 U.S. 525 (1923).

[14] Note also that the two decisions (in *Bunting* and *Muller*) do not view men and women in exactly the same way: in *Bunting* the court was concerned that overworked men would not be good *citizens*, while in *Muller* the court was concerned that overworked women would not be good *mothers* and *wives*.

[15] Ibid., pp. 552-53.

[16] Ibid.

[17] Ibid., pp. 569-70.

[18] 264 U.S. 292 (1924).

[19] "Hours of Labor and Realism in Constitutional Law," 29 *Harvard Law Review* 353 (February 1916): 367.

[20] Ibid.

[21] 300 U.S. 379 (1937).

[22] Ibid., p. 399.

[23] Ibid., p. 398.

[24] U.S. v. Darby, 312 U.S. 100 (1941).

[25] 335 U.S. 464 (1948).

[26] The labor statistics which I cite in this paper are derived from publications of the Women's Bureau and the Bureau of Labor Statistics of the U.S. Department of Labor. Most of the same statistics are cited in Babcock et al., pp. 191-229.

[27] 42 U.S.C. 2000e-2(e)(1).

[28] See, for example, Kathleen Lucas-Wallace, "Women's Employment and Suspected Health Hazards" (paper delivered at Smith College Conference on Protective Legislation and Women's Jobs, November 3-5, 1977), pp. 6-7, where the author indicates that the "critical" Title VII defense at this point is business necessity.

[29] Section 1604.1(3) of Guidelines of Equal Employment Opportunity Commission, 29 C.F.R. 1604.1(3).

[30] Weeks v. Southern Bell Telephone and Telegraph Company, 408 F. 2d 228 (5th Cir. 1969); Rosenfeld v. Southern Pacific Company, 444 F. 2d 1219 (9th Cir. 1971).

[31] 408 F. 2d 228, p. 235 (5th Cir. 1969).

[32] Ibid., p. 236.

[33] 444 F. 2d 1219 (9th Cir. 1971).

[34] 29 C.F.R. 1604.1(b) (August 19, 1969).

[35] 444 F. 2d 1219, p. 1225.

[36] Ibid., p. 1227.

[37] Cf. Roxanne Barton Conlin, "Equal Protection Versus Equal Rights Amendment–Where Are We Now?" *Drake University Law Review* 24, no. 1 (Winter 1975): 294-300. Conlin reviews all the states in which protective laws for women are still on the books, in some cases even *after* they have been held unconstitutional by the courts. See also Charles E. Guerrier, "State Protective Legislation: Good Faith Compliance or Convenient Discrimination," *Employee Relations Law Journal* 1, no. 3. Guerrier presents cogent arguments for awarding damages to Title VII plaintiffs in cases in which employers have claimed to rely "in good faith" on protective labor laws in discriminating against women workers.

[38] 400 U.S. 542 (1971).

[39] Phillips v. Martin Marietta Corp., 416 F. 2d 1257 (5th Cir. 1969).

[40] 414 U.S. 632 (1974).

[41] Ibid., pp. 639-40.

[42] Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 97 S.Ct. 401 (1976).

[43] 417 U.S. 484, pp. 496-97.

[44] 416 U.S. 351 (1974).

[45] Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

[46] 420 U.S. 636, p. 644.

[47] Ibid., p. 645.